In the Supreme Court of the United States

OCTOBER TERM, 1950.

NO. 531

CECIL C. CLARK and CATHERINE CLARK, husband and wife,

v.

JOE DWYER, Director of [illegible] of Washington.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENT IN OPPOSITION

[illegible]

ERRATUM

Cecil C. Clark and Catherine Clark,
husband and wife,

Petitioners,

v.

Joe Dwyer, Director of Agriculture
of the State of Washington,

Respondent.

Brief for Respondent in Opposition
to Petition for a Writ of Certiorari
October Term, 1960
No. ~~530~~ 531

In the first line of page 12, the word "never" should be stricken, and therefore the sentence beginning in the next to the last line of page 11 should read as follows:

Petitioners alleged that they were engaged in the growing of red and partial red varieties of apples substantial quantities of which reached interstate commerce.

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of the State of Washington (App. A of Petition) is reported at 156 Washington Decisions 440. Denial of the petition for rehearing (App. B of Petition, p. 39) is reported at 156 Washington Decisions 557.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition, except for one point: Petitioners state that they believe jurisdiction is conferred on this Court by 28 U. S. C., Section 1257 (2). However, subsection (2) of this section relates to appeals from state courts, whereas Petitioners apparently are proceeding under subsection (3) of this section, relating to petitions for a writ of certiorari.

QUESTIONS PRESENTED

I

Whether, when an amendment to a statute setting forth the grades for apples provides that all or a substantial portion of those apples previously classified as "C grade" are now to be classified as "cull," and when another statute provides that "cull" apples may be shipped to places other than processing plants only when packed in containers which clearly show that the apples contained therein are culls, and when, as a consequence, there is a considerable loss in the market value of the reclassified apples, this statute results in a deprivation of property without due process of law, or whether this statute, designed by the state legislature to better the competitive position of Washington apples, constitutes a valid exercise of the state police power.

II

Whether the aforementioned amendment constitutes a denial of equal protection of the laws, in that the reclassification affects only red and partial red varieties, which constitute 95% of the Washington apple crop, and not green and yellow varieties, which constitute the remaining 5%.

III

Whether the statutory reclassification of former "C grade" apples into a "cull" grade, in view of a further statutory requirement that such apples be labeled and packed as culls before shipment to places other than processing plants, imposes an improper burden on interstate commerce.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment XIV, section 1, of the United States Constitution which reads, in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, section 8, of the United States Constitution which reads in pertinent part:

> "The congress shall have power * * *
> "To regulate commerce with foreign na-

tions, and among the several states, and with the Indian tribes; * * *"

Chapter 230, Laws of 1959, the questioned enactment consisting of two sections, and which is now codified in sections 15.16.080 and 15.16.085 Revised Code of Washington (RCW) is set forth in the Statement p. 9, as are section 1, chapter 222, Laws of 1939, the predecessor of the questioned statute, and RCW 15.16.160, p. 11.

STATEMENT

Petitioners instituted this action for themselves and others similarly situated by complaint seeking a declaratory judgment that chapter 230, Laws of 1959, is unconstitutional under both the state and federal constitutions. To an amended complaint (App. B of Petition, pp. 25-34) Respondent demurred (App. B of Petition, pp. 35, 36). The demurrer was overruled (App. B of Petition, p. 36). Respondent declined to plead further and judgment was entered declaring the legislation unconstitutional and permanently enjoining Respondent from enforcing it (App. B of Petition, pp. 37, 38). Respondent entered timely notice of appeal (App. B of Petition, pp. 38, 39). Upon appeal the Supreme Court of the State of Washington reversed the lower court, holding that the demurrer should have been sustained because the complaint failed to state facts sufficient to exhibit that chapter 230, Laws of 1959, was unconstitutional.

Prior to enactment of the questioned legislation, the grades of apples were established in section 1, chapter 222, Laws of 1939, which read, in part:

> "It shall be unlawful for any person, firm, corporation, trust, association, co-operative or other business unit or device to pack, ship or sell apples unless such apples are sold, packed and graded in compliance with the general rules and regulations made, adopted and promulgated from time to time by the Director of Agriculture pursuant to section 4 of chapter 27 of the Laws of 1931. * * * Within sixty (60) days after the taking effect of this act general rules and regulations shall be adopted and promulgated defining and establishing the following grades:
>
> (a) Extra Fancy
> (b) Fancy
> (c) C grade
> (d) Culls
> (e) Infested Culls."

These classifications applied to all apples. Regulations defining these grades are contained in the booklet "Washington Standards for Apples," incorporated by reference in the amended complaint (App. B of Petition, p. 34).

Chapter 230, Laws of 1959, states as follows:

> "Section 1. Section 1, chapter 222, Laws of 1939, and RCW 15.16.080 are each amended to read as follows:
>
> "The director shall adopt and promulgate rules and regulations establishing the following grades of apples:
>
> "For green and yellow varieties: (1) Ex-

tra fancy, (2) fancy, (3) C grade, (4) culls, and (5) infected culls. For red and partial red varieties: (1) Extra fancy, (2) fancy, (3) culls, and (4) infected culls.

"No person shall pack, sell, or ship apples unless the same comply with the rules, regulations and grades adopted pursuant to RCW 15.16.010.

"Sec. 2. There is added to chapter 15.16 RCW a new section to read as follows:

"The director when establishing standards of color requirements for red varieties and partial red varieties of apples shall establish color standards for such varieties which are not less than the following:

1. Arkansas Black .....Fifteen percent
2. Spitzenburg (Esopus) ...Fifteen percent
3. Winesap .....Fifteen percent
4. King David .....Fifteen percent
5. Delicious .....Twenty percent
6. Staymen Winesap .....Ten percent
7. Vanderpool .....Ten percent
8. Black Twig .....Ten percent
9. Jonathan .....Ten percent
10. McIntosh .....Ten percent
11. Rome .....Ten percent
12. Red sport varieties .....Twenty percent

"Whenever red sport varieties are marked as such, they shall meet the color requirements of red sport varieties."

By section 1 of this act the C grade for red and partial red varieties of apples was eliminated, but it was retained for the green and yellow varieties of apples. Section 2 sets the minimum color require-

ments to which the fancy grade of red and partial red varieties may be set. Adoption of the minimum color requirements would result in a five percent change downward from existing color requirements for apples classified fancy.

If the minimum color requirements were adopted approximately two-thirds of the red and partial red varieties of apples now classified as C grade would pass into the cull classification. The remainder would be graded fancy. Otherwise, all of the former C grade red and partial red varieties of apples would become culls.

Handling of cull apples is restricted by operation of RCW 15.16.160 which reads:

> "*No person shall* buy, sell, offer for sale, ship, or transport any apples to or for market unless the same shall have been graded and comply with all grading requirements; and if the apples are culls, unless every container, label, bill of lading, invoice, memorandum and other document describes and defines their grade, variety and size; *nor ship or transport culls out of the area of their production, except to processing plants, unless they are packed in one-bushel baskets, ring-faced and lidded, and the name 'culls' appears on the top and bottom of each container and any labels thereon in clear, legible letters at least two and one-half inches high. Apples in the ring-face shall be representative of the contents, as to size and quality.*" (Emphasis supplied.)

Petitioners alleged that they were engaged in the growing of red and partial red varieties of ap-

ples substantial quantities of which never reached interstate commerce. The complaint avers that the placing of all or a substantial portion of those apples into the cull classification under the restrictions of RCW 15.16.160, which statute Petitioners do not attack, will render the market value thereof seventy-five percent less than if the reclassification had not been effected.

It was further alleged that the state of Washington produces and ships more apples than any other state. According to the state Department of Agriculture, growers in Washington produced approximately 33,000,000 bushels of apples valued at $73,000,000 in 1957. In 1958, 30,000,000 bushels of apples valued at $75,000,000 were produced, and similar results were expected in 1959. Approximately ninety-five percent of the apples grown in Washington are red and partial red varieties; the remaining five percent are green and yellow varieties.

Of the red and partial red varieties of apples produced during the 1957 to 1958 crop year, 4,250,000 boxes of C grade were placed into interstate commerce. For the crop year of 1958 to 1959 the figure was 2,500,000 boxes. At the time of filing the complaint 264,708 boxes of C grade red and partial red varieties of apples remained. (Petitioners state that this last group reached interstate commerce. Petition, p. 9.) The average price for these apples was two dollars a box or more.

Weather conditions and relative elevation, not inferior farming practices, are largely responsible for production of red and partial red varieties of apples classified as C grade. C grade apples have less color than have apples classified as fancy or extra fancy; it is alleged that this is the basic difference. The regulations show also differences of shape and freedom from damage. More C grade apples are produced in the southern portion of Washington than in the northern portion because apples mature earlier in the southern portion and have less opportunity to color.

C grade apples are as wholesome and healthful as the higher grades. They store and ship equally well. Petitioners claim that marketing red and partial red varieties of C grade apples as allowed prior to the reclassification—in standard apple boxes—is not detrimental to public safety, health, morals, or convenience, nor does it work a fraud upon the public.

ARGUMENT

The reclassification of apples by chapter 230, Laws of 1959, will result in placing an undetermined quantity of red and partial red varieties of apples grown by Petitioners, and others, into a lower classification. A prior, and unassailed, statute dictates and thus regulates the method by which, or the place to which, the reclassified apples may be shipped.

Petitioners do not complain of the authority of the legislature to classify apples generally. They

do not complain of the statute restricting the handling of the reclassified apples. Rather, the primary complaint is that through this reclassification a portion of their apples will be reduced in value.

The Supreme Court of the State of Washington held that this measure was a function of the state police power. In applying the attendant presumption that special facts existed to explain the validity of the enactment, the lower court concluded that the measure may well have been deemed necessary to maintain or better the industry economically by protecting the reputation of Washington apples and by improving the competitive position of such apples in the national market.

As we shall show, this decision by the state court is clearly correct, is in complete harmony with the decisions of this Court, and presents no federal question worthy of review.

I

THERE IS NO CONFLICT OF DECISIONS

Petitioners claim a conflict of the decision of the lower court with two decisions of this court: *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511: and *Hood v. DuMond*, 366 U. S. 525. Both of those cases determined state regulatory measures to be invalid as undue burdens on interstate commerce.

But an examination of the regulatory measures involved in these two cases will show that the cases in no way conflict with the decision in the instant

case. In *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511, New York had erected a barrier against out-of-state milk sellers who wished to sell in the New York market; in the instant case, there is no attempt to prevent out-of-state sellers from coming into the Washington State market, and the *Baldwin* case is therefore not in point. In *Hood v. DuMond*, 366 U. S. 525, New York discriminated against an out-of-state buyer who wished to buy milk in New York for resale in other states, and this discrimination resulted in the buyer being unable to buy milk in New York. In the instant case there is no discrimination against out-of-state buyers, and such buyers are completely free to buy Washington apples. Accordingly, *Hood v. DuMond*, 366 U. S. 525, is also not in point. It appears overly fanciful for the Petitioners to maintain that the statute in question erects any sort of barriers to interstate commerce, as did the regulatory measures in the two cases on which they rely; the statute in question in the instant case merely reclassifies apples produced within the state. It in no way restricts the freedom of out-of-state purchasers.

II

THERE IS NO SUBSTANTIAL FEDERAL QUESTION

Petitioners submit that "in the delicate difference of the shade of two apples" there is suspended an "age-old question" (Petition, p. 25) upon which this Court should pass. Respondent readily agrees that any question presented in this case is an old one. Indeed, any such question has been decided by this Court favorably to this respondent's position many times.

Petitioners' principal contention is that the police power of the state can be exercised to promote the general welfare only when it is primarily directed toward the health, safety, or morals of its citizens, and cannot be directed primarily toward the betterment of one of its most vital industries, in this case the apple industry. Petitioners further contend that in the exercise of the police power for this latter purpose, the state is prevented from imposing regulations which, though they are assumed to better the industry as a whole, will incidentally result in a burden on a certain part of the industry, that is, a decrease in value of part of the apple crop of certain producers. (See Petition, pp. 6, 17.) Both contentions are without merit, and neither presents a federal question of substantial importance.

The police power extends to the entire property and business within the local jurisdiction. *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659.

It may be utilized to the extent of even physically destroying private property where the legislature deems this necessary for protection of an important industry in the state. *Miller v. Schoene*, 276 U. S. 272. A state may, through the police power by taxation, regulate a business to adjust economic inequalities. *Great Atlantic and Pacific Tea Co. v. Grosjean*, 301 U. S. 412. It has been stated that the police power may be exercised within extremely broad limits to control practices within the business-labor field, and that it extends to all great public needs. *Day-Brite Lighting Co. v. Missouri*, 342 U. S. 421.

Indeed, the type of reasoning used by Petitioners to attempt to advance their theory of the police power by limiting it to the area of health, safety, and morals, attributing thereto a restricted meaning, was expressly disavowed in *Lincoln Federal Labor Union No. 19129, A. F. of L. v. Northwestern Iron and Metal Co.*, 335 U. S. 525.

In *Berman v. Parker*, 348 U. S. 26, 32, which declared valid an urban redevelopment act for the District of Columbia, it was stated:

> "We deal, in other words, with what has been known as the police power. An attempt to define its outer limits is fruitless for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the

> legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia or the States legislating concerning local affairs."

State regulation of the milk industry within its borders specifically for control and betterment of economic conditions in that industry are valid. *Nebbia v. New York*, 291 U. S. 502; *Milk Control Board v. Eisenberg Farm Products*, 306 U. S. 346. And, legislation resulting in quantity and, to a degree, quality control between producers and handlers of agricultural produce by state government was approved as being within state police power in *Parker v. Brown*, 317 U. S. 341. The controls instituted for economic reasons by California as shown in the latter case are obviously of much greater impact than the regulation by reclassification existing in the instant case.

Petitioners appear to reason that while other industries are subject to police regulation by states to cure particular evils, that agricultural industries should be immune from control except for very limited purposes. We contend that the actual judicially recognized practice has been otherwise. This court has said in *Tigner v. Texas*, 310 U. S. 141, at p. 145:

> "Since *Connolly's* case [*Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540.] was decided, nearly forty years ago, an impressive legisla-

tive movement bears witness to general acceptance of the view that the difference between agriculture and industry call for differentiation in the formulation of public policy. The states as well as the United States have sanctioned cooperative action by farmers; have restricted their amenability to the anti-trust laws; have relieved their organizations from taxation. [Citing federal legislation.] Such expressions of legislative policy have withstood challenge in the courts. *Liberty Warehouse Co. v. Burley Tobacco Growers; Co-op Marketing Asso.*, 276 U. S. 71. Congress and the states have sometimes thought it necessary to control the supply and price of agricultural commodities within their respective spheres of jurisdiction, and the constitutional validity of these measures has been sustained. *Mulford v. Smith*, 307 U. S. 38; *United States v. Rock Royal Co-operative*, 307 U. S. 533; *Nebbia v. New York*, 291 U. S. 502.

"At the core of all these enactments lies a conception of price and production policy for agriculture very different from that which underlies the demands made upon industry and commerce by anti-trust laws. These various measures are manifestations of the fact that in our national economy agriculture expresses functions and forces different from other elements in the total economic process. * * *"

It is submitted that the decision of the Supreme Court of the State of Washington is consistent with the views and opinions of this Court.

THE DECISION BELOW IS CORRECT

The court below concluded that chapter 230, Laws of 1959, constituted an exercise of the police power. In so concluding, the rebuttable presumption of the constitutionality of the legislation was adopted placing the burden on Petitioners to establish the invalidity of the act. This Court recognizes and utilizes that presumption. *Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194; *Pacific States Box & Basket Co. v. White*, 296 U. S. 176.

It is alleged that by the reclassification, the value of the apples of red and partial red varieties is seriously affected. This is because of operation of another statute dictating that cull apples may only be shipped to a processor or shipped elsewhere in bushel baskets. Branding the produce as culls is not in itself necessarily bad. *Detweiler v. Welch* (C. C. A. 9th), 46 F. (2d) 75, 73 A. L. R. 1440 (1930). And, that some will suffer pecuniary damage as a result of a legislative enactment falling within the police power is not sufficient to render it invalid. *Chicago, B. & Q. R. Co. v. Illinois ex rel. Grimwood*, 200 U. S. 560.

The court below found a state of facts that could reasonably be presumed to exist which would justify this legislation and sustain the validity of the act in question. This is consistent with this Court's view. *Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194; *Pacific States Box & Basket Co. v. White*, 296 U. S. 176; *Munn v. Illinois*, 94 U. S. 113. It was

assumed that the act was passed to aid economically the apple industry by maintaining or bettering the reputation of Washington grown apples. This was declared proper relying on *Sligh v. Kirkwood*, 273 U. S. 52. That case held a state statute valid that prohibited shipment of immature or otherwise unfit fruit. It was judicially assumed that the measure would protect the health of the public in the state of enactment, and would protect the reputation of the fruit on foreign markets.

The latter purpose was deemed a sufficient one for regulating upon agricultural produce. Indeed, the legislative plan of quantity controls upon agricultural products declared constitutional in *Parker v. Brown*, 317 U. S. 341, was of much greater restriction than that imposed by chapter 230, Laws of 1959. Thus, the Supreme Court of the State of Washington was correct in holding that the questioned enactment was not shown to deny property without due process of law.

It is claimed that equal protection of the laws is denied to those whose apples will become reclassified in that they are as healthy and wholesome as higher grade apples that may be shipped in standard apple boxes, the usual method, and that the green and yellow varieties of apples were not similarly to be reclassified. The lower court again properly relied upon the presumption of constitutionality and assumed that facts could exist to validate such an act. *Morey v. Doud*, 354 U. S. 457. Indeed, this Court

has repeatedly held that the legislature of a state has wide discretion in determining classifications necessary to meet believed needs. *Terrace v. Thompson*, 263 U. S. 197; *Safeway Stores v. Oklahoma Retail Grocers Assoc.*, 360 U. S. 334. That the statute could have reclassified green and yellow varieties also, and thus have been broader in scope, does not render it invalid. *Goessert v. Cleary*, 335 U. S. 464.

The lower court also properly held that police power legislation to promote public welfare, as the act in question was held to accomplish, could regulate regarding the disposal of products of the state which indirectly affected commerce when no congressional act was in conflict. The cases relied upon were: *Minnesota Rate Cases*, 230 U. S. 352; *Sligh v. Kirkwood*, 273 U. S. 52; *Detweiler v. Welch*, 46 F. (2d) 75 (9th C. C. A.).

Petitioners alleged that the grading of apples takes place at the time they are packed. (App. B of Petition, p. 26). Thus, operation of chapter 230, Laws of 1959, falls prior to shipment. It has been held that articles are not within interstate commerce until committed to a carrier for shipment. *Crescent Cotton Oil Co. v. Mississippi*, 257 U. S. 129. At best it may be said that by the reclassification and in view of the statute dictating the place or method of shipment of cull, previously C grade, red and partial red varieties of apples, chapter 230, Laws of 1959, has some indirect effect on interstate commerce. Nonetheless, it has been recognized that a

state may impose regulations of a more stringent effect than exists here which were termed to have substantial effect on interstate commerce. *Parker v. Brown*, 317 U. S. 341.

It is, therefore, contended that the decision of the Supreme Court of the State of Washington is correct on all issues.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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